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82-402

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - - Appellant

versus

CITY OF LOUISVILLE, et al. - - - Appellees

Appeal from Court of Appeals of Kentucky

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Under Kentucky law, a land rezoning decision must be based upon the evidence produced at a "trial-type due process hearing." By a special city ordinance, appellant's land was downzoned from a long-standing high density residential classification, after the mayor, who had not attended the evidentiary hearing, committed himself to downzoning proponents (of whose organization the mayor was a member) and broke a 4-4 voting deadlock among the planning commissioners who had heard the evidence. Two members of the city Board of Aldermen were also members of this same organization of downzoning proponents, and the entire Board deferred, by custom, to the recommendation of one of the organization's members who represented the ward where the land is situated. Appellant's land, thus singled-out, has been devalued, while the downzoning procedure utilized by the city has been upheld as a reasonable exercise of the police power by both the trial judge and by a 2-1 decision of the Kentucky Court of Appeals.

The federal questions are:

1. Is Ordinance No. 128, Series 1975, of the City of Louisville, unconstitutional because its enactment was accomplished by a series of procedures which were not fundamentally fair or in accordance with the due process clause of the fourteenth amendment?

2. Is the ordinance unconstitutional because it downzones only appellant's parcel of land, but does not apply to all other similarly classified parcels within the municipal boundary, and therefore violates the equal protection clause of the fourteenth amendment?

PARTIES

The appellant is Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, deceased ("Durning").

The appellees are:

City of Louisville (the "City");

Louisville and Jefferson County Planning Commission (the "Commission"); and

Board of Aldermen of the City of Louisville (consisting, at the time of appeal to the Kentucky Court of Appeals, of aldermen Jim Allen; F. David Banks; Mike Carrell; E. Porter Hatcher, Jr.; Bill Heath; W. J. Hodge; Harold R. Howard; Steve Magre; Mary Margaret Mulvihill; Danny Ross; Allen M. Steinberg; and Sharon Wilbert; and now consisting of Cyril Allgeier; F. David Banks; Denver Butler; Michael Carrell; Tom Denning; Sharon Hall; E. Porter Hatcher; Steve Magre; Reginald K. Meeks; Arthur Smith; Allen M. Steinberg; and William H. Wilson) (the "Board").

Notice under Rule 28.4(c)

The constitutionality of an ordinance of a Kentucky municipal corporation has been drawn into question by this appeal, and 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, this Jurisdictional Statement has been served upon the Attorney General of the Commonwealth of Kentucky.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - *Appellant*

v.

CITY OF LOUISVILLE, et al. - - - *Appellees*

APPEAL FROM COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

May it please the Court:

Pursuant to Rules 12.3 and 15 of this Court, appellant Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, deceased ("Durning"), files this statement of the basis upon which this Court has jurisdiction to review the judgment and opinion entered by the Kentucky Court of Appeals in this action. (Alternatively, if the Court holds the appeal is improvidently taken, Durning, as petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Kentucky entered on October 2, 1981; a rehearing of which was denied by that Court on April 9, 1982. A Motion for Discretionary Review to the Supreme Court of Kentucky was denied on June 29, 1982.)

OPINIONS BELOW

The majority and dissenting opinions of the Kentucky Court of Appeals rendered on October 2, 1981, are not reported but are contained in Appendix A, p. 23, *infra*. The denial of the Petition for Rehearing to the Kentucky Court of Appeals entered on April 9, 1982, is not reported but is contained in Appendix B, p. 29, *infra*. The order denying discretionary review to the Supreme Court of Kentucky entered on June 29, 1982, is not reported but is contained in Appendix C, p. 30, *infra*.

The judgment of the Jefferson Circuit Court dated August 27, 1980, is not reported but is contained in Appendix D, p. 31, *infra*. The opinion of the Jefferson Circuit Court dated August 15, 1980, is not reported but is contained in Appendix E, p. 32, *infra*. The minutes of the meetings of the Louisville and Jefferson County Planning Commission on January 23, 1975, March 6, 1975, March 20, 1975 and April 3, 1975, are not reported but are contained in Appendix F, G, H, and I, pp. 40-48, *infra*. The resolution of the Louisville and Jefferson County Planning Commission passed on April 3, 1975, is not reported but is contained in Appendix I, p. 47, *infra*. The relevant minutes of the meeting of the Board of Aldermen of the City of Louisville on October 14, 1975, are not reported but are contained in Appendix J, p. 49, *infra*. The ordinance of the City of Louisville passed on October 14, 1975, effective October 28, 1975, is not reported but is contained in Appendix K, p. 51, *infra*.

JURISDICTION

This is an appeal drawing into question the validity of a municipal ordinance downzoning real property on the ground that it is repugnant to the United States Constitution. The majority judgment and opinion of the Kentucky Court of Appeals, which is sought to be reviewed, was filed on October 2, 1981, and held the ordinance to be valid. A Petition for Rehearing was denied on April 9, 1982, and a Motion for Discretionary Review to the Kentucky Supreme Court was denied on June 29, 1982. The jurisdiction of this Court to review the final judgment by direct appeal is invoked pursuant to 28 U.S.C. § 1257(2) which provides for such an appeal where a state statute or local ordinance is upheld when assailed as repugnant to the Constitution. (This Court also has jurisdiction to review the judgment and opinion on a petition for certiorari pursuant to 28 U.S.C. § 1257(3).) Decisions which sustain the jurisdiction of the Court are *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 207, n. 3 (1975) (a city ordinance is a state statute for purposes of § 1257(2)); *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Eubank* v. *Richmond*, 226 U. S. 137 (1912).

ORDINANCE, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

City of Louisville ordinance (see Appendix K)

Ordinance No. 128 Series 1975, effective October 28, 1975:

"AN ORDINANCE TO CHANGE THE ZONING FROM R-7 APARTMENT TO R-5A RESIDENTIAL APARTMENT IN THE NORTHEAST CRESCENT HILL AREA. (Docket No. 9-130-74)

WHEREAS, the Board of Aldermen has considered the evidence of the public hearing held by the Planning Commission and the recommendations of the Planning Commission and its staff, and

WHEREAS, the proposed change in zoning is in agreement with the Comprehensive Plan, and

WHEREAS, the original zoning classification given to this property was inappropriate and improper, NOW, THEREFORE,

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE:

SECTION 1. That the herein described property as shown on the District Map accompanying and made a part of Zoning Ordinance No. 66, Series 1971, be and the same is hereby changed from R-7 Apartment to R-5A Residential Apartment as shown by plat attached hereto. Said property is in the City of Louisville and is described as follows:

BEGINNING at a point in the intersection of the Southwest line of Fenley Avenue and the South-

east line of a twenty-foot alley adjacent to the property of the Louisville Water Company; thence Southeastwardly with the said Southwest line of Fenley Avenue 625 feet, more or less, to the intersection of the Northwest line of Blackburn Road; thence at a right angle to Fenley Avenue, Southwest 200 feet; thence at a right angle, Northwest 625 feet, more or less, to the aforesaid Southeast line of the twenty-foot alley; thence Northeast 200 feet to the point of beginning. Being all the property fronting on the Southwest side of Fenley Avenue from the Southeast line of the property of the Louisville Water Company to the Northwest line of Blackburn Road.

SECTION 2. This Ordinance shall take effect upon its passage and approval."

Kentucky Revised Statutes

KRS 100.211(1)

"A proposal for amendment to any zoning regulation may originate with the planning commission of the unit, with any fiscal court or legislative body which is a member of the unit, or with the owner of the property in question. Regardless of the origin of the proposed amendment, it shall be referred to the planning commission before adoption. The planning commission shall then hold at least one (1) public hearing after notice as required by KRS Chapter 424 and make recommendations to the various legislative bodies or fiscal courts involved, and it shall take a majority of the entire

legislative body or fiscal court to override the recommendation of the planning commission."

KRS 100.213

"Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the community's comprehensive plan, or in the absence of such a finding, that one or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court.

(1) That the original zoning classification given to the property was inappropriate or improper.

(2) That there have been major changes of an economic, physical or social nature within the area involved which were not anticipated in the community's comprehensive plan and which have substantially altered the basic character of such area."

United States Constitution

Fourteenth Amendment, Section One

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of the Facts[1]

Durning is the owner of a parcel of 2.4 acres of unimproved land that has been zoned since 1960 for a high density residential classification permitting up to 34 dwelling units per acre, and is shown as "high density" on the map of the county-wide Comprehensive Plan.[2]

On April 3, 1974, a tornado damaged certain improved areas of the City, felling trees on the Durning parcel. Thereafter, members of the Crescent Hill Community Council (the "Council") began meeting with City officials to formulate a downzoning plan intended to preserve the predominantly single-family character of a damaged area one-half mile from the Durning parcel.[3]

The Council is a private organization which included as members the mayor and his wife, two members of the Board of Aldermen (the "Board") and the

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[1]All of the essential facts and documents are contained in requests for admission, virtually all of which were either admitted or were ordered to be taken as admitted by the trial court under Civil Rule 36, which is substantially the same as FRCP 36(a). These admissions and court order are found in the record of this action at pages 103-139, 250-252, 334-342. Unadmitted facts were established by depositions filed in the record.

[2]R 2, Ex. A, R 103, 112, 250-251, Docs. 1 & 2.

[3]R 112, 114, 251.

director and a staff member of the Planning Commission (the "Commission"). Members of the Council had held receptions for the mayor during his 1973 election campaign. The Council favored single-family homes, generally opposed apartments, and in 1974 had a committee working "to facilitate downzoning efforts of the community." Neither Durning nor his family are members of this organization.[4]

A study team was formed of eight Commission staff members, one of whom was also a Council member and resided 480 feet from the Durning parcel. This team met with Council members and prepared a report recommending the downzoning of the damaged area of Crescent Hill, but also, unknown to Durning, recommended downzoning the vacant Durning parcel one-half mile away to an uncreated classification to be known as R-5A, which would reduce the number of permissible units from 34 to 12 per acre.[5]

Unknown to Durning, the mayor imposed an executive "moratorium" on building permits for properties targeted for downzoning, in order to prevent the owners from building upon their land in accordance with existing zoning classifications. The Board later passed an ordinance creating a legislative moratorium.[6]

The Council's president, Les Bryant, testified that their concern had been with the damaged area, and that he was "very much pleased . . . a little surprised"

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[4]R 112, 114, 251.

[5]R 107, Doc. 69, R 117, 251.

[6]R 115, 118-119, Docs. 42 & 58.

to see Durning's isolated parcel included in the downzoning proposal, and that after the downzoning had been completed on the damaged area, "we turned to the Durning property and that proposal and decided to see what we could do up there with that one.'"

'The complete text of this testimony follows (R 115-117, 251):

". . . [T]he two downzoning proposals came back from the Planning Commission, brought back to the neighborhood to the Community Council, which I think you have to understand that the Community Council was the only body in the area that had any cohesiveness, that halfway represented the people in the neighborhood. There is no way that we represented everybody. We firmly acknowledge that fact, but there was a group of almost 500 in the organization, so we felt like this was the only group that could really halfway speak for the neighborhood, so these two plans were brought back to us.

"One was the large parcel between Stilz, Frankfort, Bayly, and Grinstead Drive. The other parcel was Mr. Durning's piece of property which, to be there again candid, I hadn't given much thought about that property up there, to be honest, and when it came back I was very much pleased. I was a little surprised, because I knew this (indicating) [damaged Crescent Hill area] was definitely in need of some help, so far as some downzoning, but his piece of property there—I had only been up there once or twice after the tornado, and hadn't given it much thought, but apparently somebody on the Planning Commission had looked at this piece of property and decided that it needed to be downzoned, so they brought the proposals back to us, this big piece and Mr. Durning's piece, and we felt like at that time this piece (indicating) [damaged Crescent Hill area] was more important, that the work should be done on it, and as this thing progressed, as the months went by, I can't remember whether we suggested it or the Planning Commission did, but we broke these two pieces of property apart. In other words, when we went before the Planning Commission, it was decided that it would be wrong to take them together and say we want a vote on both of these right now, this one and this one. Somewhere down the line it was de-

(Footnote continued on following page)

In November of 1974, without notice to Durning, the Commission staff prepared an application[7] to downzone Durning's property to the uncreated R-5A classification, and the Commission assigned January 25, 1975, as the evidentiary hearing date for the Durning property and 2,000 other parcels. The Board then created the new R-5A zoning classification.[8]

About January 13, 1975, the Commission's staff notified Durning for the first time of the scheduled

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(Footnote continued from preceding page)
cided to break them apart, because we didn't know whether Mr. Durning's would possibly hold this up, or whether this would hold Mr. Durning's up, so I guess rather than to take a chance and to get both of them bogged down, we would send them through one at a time. We felt like this one (indicating) [damaged area] was the most important, so far as the neighborhood was concerned, because we had almost a paranoia fear at that time of the streets along Grinstead Drive being bought up by speculators for use for high density apartment zoning, so we felt like we had to do something here (indicating) [damaged area] immediately. So, that is, in fact, what we did, and that was run on through with practically no opposition. So, after that was completed, and was in fact, downzoned, we turned to the Durning property and that proposal and decided to see what we could do up there with that one.

". . . The Durning area up there is fairly isolated. There are no homes on that property, so, therefore, you know, it just stands to reason to me, logically, that we weren't really concerned about it. I mean, sure, I realized it was high density zoning, but down here we had buildings that were down and we felt certain that people weren't going to rebuild these houses, they were going to be sold out and that's the reason I put such a prime importance on this part was the fact there was going to be some selling done here, some property changing hands, which I didn't feel like was the case with the Durning property."

[7] R 106, Doc. 52, R 250.

[8] R 118, 251.

January 25 hearing date. After the hearing, members of the Commission deadlocked 4-4 on the proposal to downzone the Durning parcel. This deadlock continued at the March 6 and March 20 meetings.[10]

On March 31, Council members who lived near the Durning parcel and who had hosted a campaign reception for the mayor, telephoned the mayor (who was also a member of the Council) and asked him to break the 4-4 Commission deadlock in his capacity as an *ex officio* member of the Commission—although the mayor had never before attended a Commission rezoning hearing in this capacity and had not heard the evidence presented at the January 25 hearing in the Durning case.[11] Other Council members sent letters to the mayor.[12] The Council president testified that the mayor committed himself to downzoning the Durning parcel.[13]

On April 3, 1975, without notice to Durning, the mayor examined a copy of the record of the Durning hearing, which omitted certain exhibits and included matters *dehors* the record, and made a private visit to the Durning parcel, returning to the Commission meeting on the same day to break the deadlock. A mayoral employee on the Commission—the City Director of Works—made the motion to downzone, which was

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[10]R 119-121-122, 251.

[11]R 124, 126, 251, 336-337.

[12]R 108, Docs. 82-90, R 124, 251.

[13]"I think we got a commitment in a sense, yes sir. I can't recall what his exact words were, but the impression I got from him was that he was, more or less, certainly in favor of the downzoning and would do everything in his power to see that it was carried out, . . ." Bryant Dep. 148; Spring. Dep. 68-69.

seconded by a mayoral appointee to the Commission who switched from her previous position in order to side with the mayor.[14] The chairman of the Commission switched his position in order to oppose downzoning, explaining:

> "I felt Mayor Sloane was trying to ram something down our throats there and I felt like it was improper."[15]

Immediately following the tie-breaking vote, counsel for Durning was permitted by the Commission to interrogate the mayor, who assured counsel that he had no conversations with people in the Crescent Hill area about the situation and that no one had called or written to him about how he should vote.[16] Six days later, the mayor sent letters of acknowledgment to those members of the Council who had solicited his tie-breaking vote.[17]

As pointed out in the dissenting opinion of the Kentucky Court of Appeals, the Commission's findings of fact appear to deny Durning due process of law.[18]

With additional prodding by the Council,[19] the Commission's downzoning recommendation was implemented by an ordinance of the Board of Aldermen, two of whose members[20] also belonged to the Council. The

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[14]R 125-126, 251.

[15]Spring. Dep. 118.

[16]R 126, 251.

[17]R 128, 251.

[18]Appendix A, p. 25, *infra*.

[19]R 128, 133-135, 251.

[20]R 114, 251.

procedures followed by the Board also denied Durning due process of law.[21] The downzoning ordinance[22] went into effect on October 28, 1975.[23] The resulting estimated depreciation of the Durning parcel ranges from $33,000 to $88,500, depending upon the manner in which the parcel would be developed.[24]

Although there are other parcels in the vicinity zoned high density that could have been downzoned, the Durning parcel was the only one singled out and downzoned on the north side of Frankfort Avenue in Louisville, Kentucky.[25]

B. Procedural History

This court action began with a complaint filed by Durning against the City and the Commission,[26] stat-

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[21]Not only did Board members attend a private viewing of "evidence" supplied by Commission staff members after the evidentiary hearings on January 25, 1975, but when the Commission's thus adopted recommendation went to the Board, First Ward Alderman William B. Stansbury, a member of the Council whose constituents include the residents of Crescent Hill, favored adoption of the ordinance downzoning the Durning parcel. His endorsement guaranteed adoption because of a longstanding practice of the aldermen to support, without question or exercise of judgment, any zoning change advocated by the alderman of the ward wherein the land involved in the rezoning is located. The Board, following their custom, unanimously approved the downzoning ordinance. R 129, 136, 251-252, 422-426, Spring. Dep. 80-86.

[22]Appendix K, p. 51, *infra*.

[23]R 135, 251.

[24]Baugh Dep. 35-36.

[25]R 137-138.

[26]Subsequently, separate counsel for the Board of Aldermen appeared and participated in all stages of the action.

ing, *inter alia*, that the procedure leading up to the adoption of the Commission's downzoning recommendation and the City's downzoning ordinance failed to accord Durning either procedural or substantive due process of law and rendered the ordinance unconstitutional and void under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.[27] These Federal issues were further seasonably asserted by Durning in his *proposed* Findings of Fact and Conclusions of Law[28] tendered to the trial court and incorporated into his trial court brief[29] and asserted in his reply brief,[30] and

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[27]Paragraph 12 of the Complaint states (R 7):

"The procedure leading up to the adoption of the recommendation by the defendant Planning Commission to downzone the plaintiff's property from R-7 Apartment to a newly-created classification of R-5A Residential-Apartment, and the procedure followed by the defendant City of Louisville in adopting Ordinance 128, Series 1975, implementing the recommendation of the defendant Planning Commission, was arbitrary and capricious; constitutes the unlawful taking of a valuable property right of the plaintiff without due process of law; failed to accord the plaintiff either procedural or substantive due process of law; and renders Ordinance 128, Series 1975, unsupported by substantial evidence, unconstitutional and void, within the meaning of sections 1(5), 2, 13 and 242 of the Kentucky Constitution; and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution."

[28]Pp. 1, 45-49, 54-55. See Appendix M, pp. 54-55, *infra*. These proposed findings and conclusions were inadvertently omitted from the original record on appeal, and were separately certified by the trial court on March 30, 1981, as a supplement to the record on appeal.

[29]R 501, 506, 509; Appendix M, p. 55, *infra*.

[30]R 565-566, 586, 608, 620.

at all stages of the appellate proceedings, including his brief,[31] reply brief,[32] and petition for rehearing[33] in the Kentucky Court of Appeals, and his motion for discretionary review[34] in the Kentucky Supreme Court.

The trial court ruled[35] that there was no denial of due process of law, and the majority opinion of the Kentucky Court of Appeals adopts[36] the opinion of the trial court, while the dissenting opinion[37] finds the downzoning to be arbitrary, illegal and void. Neither the trial court nor the appellate court discussed the specific questions of procedural due process or equal protection, or mentioned any of the specific facts upon which Durning bases his claim of a denial of procedural due process and equal protection under the Fourteenth Amendment.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Much more is involved here than the injustice done to Durning. The real issues are whether the governing body of any locality or state may, on any pretext, downzone only certain parcels of land without the consent of the owners; and, if such special legislation is permissible, what "rudiments of fair play"[38] are due

[31]Pages 16 through 23.
[32]Page 4.
[33]Page 5.
[34]Pages 17 through 23.
[35]Appendix E, pp. 36 and 38, *infra*.
[36]Appendix A, p. 25, *infra*.
[37]Appendix A, pp. 25 and 28, *infra*.
[38]*Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165, 168 (1914).

an owner in such a confrontation with the government, under the due process clause of the fourteenth amendment? If downzoning is merely a political matter, then the scope of a citizen's use of his property is subject to the whim of either the local legislative body or a majority of the electorate or neighbors. On the other hand, if downzoning is an adjudicative or quasi-judicial matter, as the Kentucky court has held rezonings to be in an earlier decision,[39] and as the Kentucky Court of Appeals stated in this Durning case,[40] then there are basic due process requirements which must be observed by the governing body and its officials from beginning to end—from the conception of the idea by either the planning commission or legislative body, throughout all subsequent procedures, including a fair and impartial hearing and deliberation and fact-finding by the members of all agencies and bodies that play a role in the process. Without these essential ingredients—especially fair and impartial decisionmakers, a landowner receives "nothing but the semblance of a hearing." *Chin Yow* v. *United States*, 208 U. S. 8, 12 (1908).

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[39] *City of Louisville* v. *McDonald*, Ky., 470 S. W. 2d 173, 179 (1971).

[40] Appendix A, p. 24, *infra* (". . . [T]he hearing . . . satisfied the requirements of an adjudicatory hearing and due process.")

A. THE DOWNZONING ORDINANCE IS INVALID BECAUSE THE PROCEDURES UTILIZED BY THE CITY OF LOUISVILLE AND THE PLANNING COMMISSION DID NOT COMPORT WITH BASIC REQUIREMENTS FOR DUE PROCESS OF LAW.

During the half-century since *Euclid* v. *Ambler Co.*,[41] this Court has considered "only a handful of zoning cases,"[42] none of which involved the question of what fundamental procedures are required by the due process clause of the Fourteenth Amendment when the governing authority initiates proceedings to downzone a parcel of land.[43] No reported federal court decision has struck down a state zoning authority's decision for failing to adhere to procedural due process require-

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[41]272 U. S. 365 (1926). The Court pointed out that constitutional questions involving the application of a zoning law to particular properties should be resolved as the cases arise. *Supra* 272 U. S at 397.

[42]See *Eastlake* v. *Forest City Enterprises*, 426 U. S. 668, 683 (1976), dissenting opinion by Justice Stevens.

[43]*Eastlake*, *supra* n. 14, concerned an unusual popular referendum procedure for the approval of rezonings, and did not involve downzonings instituted by the governing authority. *Arlington Heights* v. *Metro Housing Corp.*, 429 U. S. 252 (1977) concerned alleged racial discrimination and the application of the equal protection clause to a *refusal* to upzone. All other decisions involved the *substantive* due process requirements for comprehensive general municipal ordinances having city-wide application. *Nectow* v. *Cambridge*, 277 U. S. 183 (1928); *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974); *Young* v. *American Mini Theatres*, 427 U. S. 50 (1976) (equal protection); *Moore* v. *City of East Cleveland*, 431 U. S. 494 (1977); *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); *Schad* v. *Mt. Ephraim*, 452 U. S. 61 (1981).

ments,"[44] and there exists a conflict among the highest courts of the various states as to whether rezoning is a purely legislative or political matter[45] to which principles of due process have limited application; or whether rezoning proceedings are quasi-judicial in nature.[46] Other jurisdictions take a position somewhere between the foregoing views.[47] Kentucky's highest court has held that the enactment of a comprehensive city-wide zoning plan is a legislative matter, but the rezoning of specific parcels of property is an adjudicative matter requiring a "trial-type due process hearing."[48] The majority opinion of the Kentucky Court of Appeals refers to the downzoning hearing in this case as "adjudicatory."[49] Given the law, therefore, that Durning was entitled to such a due process adjudicatory hearing in this case, it seems indisputable that the first requirement is the impartiality of all decisionmakers. *In re Murchison*, 349 U. S. 133, 136 (1955); *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970); *N.L.R.B.* v. *Phelps*, 136 F. 2d 562, 563-564 (5th Cir. 1943). This requirement was totally lacking from the time that the mayor

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[44]Kahn, *In Accordance With a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L. Q. 1011, 1012 (1979).

[45]Phillips, *The Appearance of Fairness Doctrine*, 20 URBAN L. ANN. (1980), p. 82, note 40.

[46]*Id.* note 45, page 83 of article, footnote 47; *Eastlake* v. *Forest City Enterprises*, 426 U. S. 668, 683-684 (1976); *Fleming* v. *City of Tacoma*, 81 Wash. 2d 292, 502 P. 2d 327 (1972).

[47]*Id.* note 45, page 83 of article, footnote 48.

[48]*City of Louisville* v. *McDonald*, *supra* 470 S. W. 2d 173, 179.

[49]Appendix A, p. 24, *infra*; n. 40, *supra*.

of Louisville (a member[50] of the organization of downzoning proponents, and committed[51] to the Durning downzoning) injected himself into the proceedings and broke the deadlocked vote of the planning commissioners. This lack of impartiality continued through to the termination of the proceedings, when the matter went to the Board where the ward alderman (who was also the aldermanic president) and one other alderman were also members of the formal organization of downzoning proponents. When the ward alderman favored the downzoning, that assured passage of the ordinance because of aldermanic custom.[52]

In addition to the essential requirement of impartiality, the final adjudication of the decisionmakers must rest solely on the evidence adduced at the hearing, and should state the reasons for the determination and indicate the evidence relied upon. *Goldberg, supra* 397 U. S. at 271. Not one of these basic requirements was accorded Durning.[53] Certain members of this Court have discussed the applicability of basic due process requirements to adjudicative proceedings lead-

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[50]R 114, 251.

[51]*Supra* n. 13; Bryant Dep. 148; Spring. Dep. 68-69.

[52]*Supra* n. 21; R 136, 251-252; Spring. Dep. 80-86.

[53]The reasons stated in the Commission's downzoning resolution, and in the City's downzoning ordinance, are parrotings of statutory requirements and of general planning principles and objectives listed in the text of the community's comprehensive plan. See KRS 100.213 and R 2, Ex. A. This comprehensive plan is authorized by KRS 100.183, and its statement of objectives, principles and policies is required by KRS 100.187(1). See also dissenting opinion of Kentucky Court of Appeals, Appendix A, p. 25, *infra*.

ing up to the rezoning of specific parcels of land.[54] In denying Durning any relief, the Kentucky courts have eviscerated the rights which lie at the very core of due process.

B. THE LOUISVILLE DOWNZONING ORDINANCE IS INVALID BECAUSE IT CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The highest court of Kentucky has recognized that a land use ordinance confined in its application only to a particular block in a section of a city is discriminatory and void as a denial of equal protection of the law. *City of Covington* v. *Summe & Ratermann Co.*, 210 Ky. 520, 524, 276 S. W. 534, 535 (1925). Although both this decision and the equal protection clause of the Fourteenth Amendment were asserted in the Kentucky Court of Appeals[55] and denial of equal protection was again asserted in appellant's motion for discretionary review to the Kentucky Supreme Court,[56] and although a denial of equal protection had been asserted in the trial court,[57] none of the courts acknowledged the claim.

This Court early recognized that equal protection of the laws is denied when, between two persons similarly situated, "burdens are cast upon one which are not cast upon the other," *Cotting* v. *Godard*, 183

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[54] *Eastlake* v. *Forest City Enterprises*, *supra* 426 U. S. at 682-684. This case involved a referendum procedure not authorized by Kentucky law.

[55] Appellant's Brief, pp. 16 and 20-21; Reply Brief, p. 5; Petition for Rehearing, p. 5.

[56] Motion for Discretionary Review, p. 17.

[57] R 7; *supra* n. 27.

U. S. 79, 111-112 (1901); *Truax* v. *Corrigan*, 257 U. S. 312, 332-333 (1921), and that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights" is an essential pre-condition to the realization of other basic rights guaranteed by the Fourteenth Amendment, which invalidates any and all manifestations of state action—legislative, judicial, or executive—inconsistent with these basic guarantees. *Shelley* v. *Kraemer*, 334 U. S. 1, 10, 14 (1948). Nor can an arbitrary selection of one person or several persons be justified by merely calling it a "classification." *Cotting* v. *Godard, supra* 183 U. S. at 107; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37 (1928). Indeed, legislation embodying certain classifications is presumptively invalid unless a compelling state interest is shown as justification. Such prohibited classifications include sex,[58] race,[59] national origin,[60] and legitimacy.[61] One landowner or a group of landowners—but less than all—owning land zoned for high density use, is an equally questionable classification for downzoning ordinances instigated by residents of predominantly single-family neighborhoods.

Appellant does not question the validity of the original Louisville ordinance adopting zoning classifications for all parcels of property within the munici-

[58] *Frontiero* v. *Richardson*, 411 U. S. 677 (1973).
[59] *Loving* v. *Virginia*, 388 U. S. 1 (1967).
[60] *Oyama* v. *California*, 332 U. S. 633 (1948).
[61] *Levy* v. *Louisiana*, 391 U. S. 68 (1968).

pal boundaries. However, an arbitrary downzoning of this one singled-out parcel of land located a half mile away from any other rezoned parcel is discriminatory and a violation of the equal protection clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, and based upon the authorities cited, this Court should take jurisdiction of this appeal, or, in the alternative issue a writ of certiorari to the Kentucky Court of Appeals to review its judgment. In either event, this Court should invalidate Ordinance No. 128, Series 1975, of the City of Louisville and reverse the decision of the Kentucky Court of Appeals rendered on October 2, 1981.

Respectfully submitted,

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